

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

APR 27 2001

PATRICK FISHER
Clerk

JORGE ANTONIO CHAVEZ
GONZALES, a/k/a JORGE
ANTONIO CHAVEZ,

Petitioner-Appellant,

v.

THE STATE OF OKLAHOMA;
JAMES L. SAFFLE, Director of the
Oklahoma Department of Corrections,

Respondents-Appellees.

No. 00-6336
(D.C. No. 99-CV-1805-R)
(W.D. Okla.)

ORDER AND JUDGMENT *

Before **EBEL** , **ANDERSON** , and **KELLY** , Circuit Judges.

After examining petitioner's brief and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

Petitioner Jorge Antonio Chavez Gonzales, also known as Jorge Antonio Chavez, an Oklahoma state prisoner convicted by a jury of assault and battery with a dangerous weapon, seeks a certificate of appealability (COA) to challenge the district court's order adopting the magistrate judge's recommendation¹ to deny his petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. See 28 U.S.C. § 2253(c)(1)(A) (no appeal unless COA issued). He has also requested leave to proceed on appeal without prepayment of fees. That request is granted. See McIntosh v. United States Parole Comm'n, 115 F.3d 809, 812-13 (10th Cir. 1997) (stating leave to proceed in forma pauperis requires financial inability to pay and showing of nonfrivolous argument to support claims). Upon consideration of the issues raised, we deny issuance of a COA and dismiss the appeal.

The parties are familiar with the underlying facts; therefore, we do not repeat them. On appeal, petitioner argues he is entitled to habeas relief because his trial attorney provided constitutionally ineffective assistance of counsel for failing to (1) obtain and present the testimony of Jessie Rios that the victim admitted that the shooting was an accident; (2) memorialize the victim's statement to defense counsel that the shooting was an accident, thus preventing

¹ The case was referred to a magistrate judge pursuant to 28 U.S.C. § 636(b)(1)(B).

him from using the statement to impeach the victim; (3) present evidence of a laboratory report, an emergency room report, and the physical evidence of the victim's dusty pants. According to Mr. Gonzales, the laboratory and emergency room reports were necessary to prove that the victim had ingested cocaine and cannabis prior to the shooting. The pants would show that the victim had fallen, contrary to her testimony that she had not. Mr. Gonzales has abandoned on appeal the remaining issues raised to the district court.

This case is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). Before a COA will issue, petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To do so, he must demonstrate "that reasonable jurists could debate whether (or, for that matter agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quotations omitted).

We have carefully reviewed petitioner's brief and the appellate record. For substantially the same reasons underlying the magistrate judge's July 27, 2000 report and recommendation and the district court's September 15, 2000 order, we conclude that petitioner "has failed to raise issues that are debatable among jurists, or that a court could resolve the issues differently, or that the questions

deserve further proceedings.” United States v. Sistrunk, 111 F.3d 91, 91 (10th Cir. 1997).

The motion for leave to proceed in forma pauperis is granted. The application for issuance of a COA is denied. Appeal DISMISSED.

Entered for the Court

Paul J. Kelly, Jr.
Circuit Judge